IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, vs. HUGH BRYSON, Appellee.	)	NO. 22474

REPLY BRIEF OF APPELLANT

J. WALTER YEAGLEY
Assistant Attorney General

CECIL F. POOLE
United States Attorney
Northern District of California

JERROLD M. LADAR
Assistant United States Attorney

KEVIN T. MARONEY
LEE B. ANDERSON
Attorneys
Department of Justice
Washington, D. C. 20530

Attorneys for Appellant

SUBJECT INDEX

AUTHORITIES CITED

Cases

STATUTES

MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, vs. HUGH BRYSON, Appellee.	NO. 22474 REPLY BRIEF OF APPELLANT

THE ISSUE OF CUSTODY

Appellant does not concede jurisdiction. This is clear from the discussion in our opening brief (pp. 6-9).

Appellee suggests at page 9 of his brief that the issue of custody has been determined by findings made by the court below. It is true that in its opinion the District Court stated that:

> "Petitioner is presently on parole and a substantial part of his fine ($8,000 remains unpaid. Consequently, his parolee status continues with its attendant restrictions on his personal freedom. He must make monthly reports and must seek permission to travel outside the state. He is unable to vote." (R. 78)

These are legal conclusions asserted by the lower court based upon no facts and quite inconsistent with both law and logic. The claim that appellee is still on parole because of non-payment of his fine begs the very question at issue: Had his term of sentence and legal custody ended? The record reveals nothing complying with the intendments of

Rule 52, F.R.C.P., and is simply an unsupposed conclusion by the court as matter of fact of that which was and remains a question of law.

Bryson had completed his sentence before the end of 1963. Whatever view the parole and probation officers may have entertained (and there is no evidence in the record as to their position or action in this respect) they could not confer jurisdiction upon themselves to maintain a parole status over appellee in view of the statutory scheme of Title 18 in the following Sections:

Section 3568* ("* * * no sentence shall prescribe any other method of computing the term.");

Section 3569* (procedures for discharge of fines imposed upon indigent prisoners);

Section 4161* (method of computation of sentence);

Section 4164* (released prisoner as parolee);

and finally, the clear intendment of

Section 4203 (relating to terms and conditions of parole and release)which provides in appropriate part as follows:

> "Such parolee shall be allowed in the discretion of the Board, to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports from such paroled person, as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced."

---

* The relevant portions of these sections appear in the Appendix, post, as does also Section 4163 (discharge).

The statement in United States v. Gottfried, 197 F.2d 239, cited on page 10 of appellee's brief, to the effect that jurisdiction of the parole board continues until a fine is paid or otherwise discharged, could not of course accomplish an enlargement of term beyond that prescribed by Congress.

It is significant that neither the opinion of the District Court nor the brief of appellee cites a single authority refuting appellant's position. That position is concisely stated in In re Greenwald, 77 Fed. 590 (Circuit Court, N.D. Calif.) in relation to the effect of Section 1042 of the Revised Statutes, the predecessor of Section 3569:

> "There is nothing, however, in the foregoing provisions to indicate that any imprisonment to enforce the payment of a fine imposed may be extended beyond the maximum term of imprisonment fixed by Congress in punishment of the particular offense denounced, * * *" (At 594)

APPELLEE IS FORECLOSED FROM THIS CHALLENGE BY THE DECISION IN DENNIS V. UNITED STATES

We submit that appellee Bryson is barred from challenging the constitutionality of Section 9(h) by the ruling of the Supreme Court in Dennis v. United States, 384 U.S. 855.

As the Dennis court said (at p. 865),

> "Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case."

Bryson was indicted under Title 18 U.S.C. Section 1001, charged with making a false affidavit. Section 1001 is made applicable to affidavits filed under Section 9(h) of the Taft-Hartley Act (29 U.S.C. Section 159(h)) by the terms of that Section.

The same reasoning upon which the Dennis Court refused to reach the constitutionality of Section 9(h) applies as to Bryson's case before this Court. His attempt to distinguish Dennis does not withstand scrutiny. First, contrary to all rationalization is his premise that the offense of making a false affidavit is less "onerous" than the offense of conspiring to make such false affidavits. By statute, each of these offenses is subject to the same identical penalty, not more than 5 years imprisonment or $10,000 fine, or both. Nor can Dennis be distinguished by the argument that Bryson has always denied his guilt. As we said in our Opening Brief (pp. 11-12) Bryson, like the Dennis defendants,filed a false affidavit in order to secure for his union as well as for himself, the advantages of access to the facilities of the Labor Board, and like them, he pleaded "not guilty". The argument of denial of guilt is immaterial and completely irrelevant to the basic question of whether justice dictates that Bryson be granted relief from his conviction. Bryson was tried and convicted by a jury who heard all the evidence. Equally irrelevant is Bryson's suggestion that there is a distinction in that the Dennis case was on a direct appeal from conviction, while Bryson is seeking to invoke a post-conviction remedy. Bryson cannot expect to benefit from the fact that his plea for relief is late in reaching the Court. Furthermore, Bryson is not

the "sole" victim of Section 9(h), as he suggests. In several cases the courts have sustained convictions under 18 U.S.C. 1001 for the filing of false non-communist affidavits by union officers or for conspiring to do so. For example, Lohman v. United States, 266 F.2d 3 (C.A. 6); Sells v. United States, 262 F.2d 815 (C.A. 10), cert. denied 360 U.S. 913; Hupman v. United States,219 F.2d 243 (C.A. 6), cert. denied, 349 U.S. 953; West v. United States, 274 F.2d 885; and, of course, Dennis v. United States, 384 U.S. 855.

THE ARGUMENT OF UNCONSTITUTIONALITY OF SECTION 9(h) IS WITHOUT MERIT

As we have shown in our Opening Brief (pp. 15-23) Bryson's arguments attacking the constitutionality of the statute have no merit. American Communications Association v. Douds, 339 U.S. 382, held that Section 9(h) was constitutional as a reasonable provision by Congress to prevent communist control of and infiltration into the labor movement as part of their conspiracy to overthrow the government of the United States. United States v. Brown, 381 U.S. 437, did not overrule Douds (see our Opening Brief, pp. 15-17). In Leedom v. International Union of Mine, Mill and Smelter Workers, 352 U.S. 145, and Amalgamated Meat Cutters v. National Labor Relations Board, 352 U.S. 153, the court added that the sole sanction for the filing of a false affidavit under Section 9(h) is the criminal penalty imposed on the union officer who files a false affidavit. Now Bryson suggests that this sole sanction is constitutionally invalid because it is too vague and because it abridges rights of free speech and association and to

engage in political activities. In other words, while Congress, according to Douds, may constitutionally require the filing of non-communist affidavits, it may not constitutionally make punishable the filing of such an affidavit which is false. The suggestion carries its own refutation.

Bryson now (pp. 23-25) attempts to give an "overbroad" construction to the recent decisions of the Supreme Court. Moreover, in United States v. Robel, the Court recognized that "While the Constitution protects against invasion of individual rights, it does not withdraw from the government the power to safeguard its vital interests. . . . And Congress can declare sensitive positions in national defense industries off limits to those who would use such positions to disrupt the production of defense materials." (389 U.S. 258, at 267). In effect, the Court has said that there are "sensitive" positions and areas from which Congress by properly drawn legislation may bar certain types of individuals. We submit that Section 9(h) would withstand constitutional attack notwithstanding the recent decisions of the Supreme Court cited by Bryson.

We have already pointed out in our Opening Brief that the answer to appellee's contentions is that it is not necessary or proper for this Court to consider the constitutionality of Section 9(h). Bryson was convicted by a jury of willful and knowing violation of Section 1001 of Title 18, and questions with respect to the validity of his conviction and the constitutionality of Section 9(h) are irrelevant. Dennis v. United States, 384 U.S. 855.

CONCLUSION

For the foregoing reasons, the order of the District Court should be set aside and the conviction and sentence of the trial court should be reinstated.

Respectfully submitted,

J. WALTER YEAGLEY
Assistant Attorney General

CECIL F. POOLE

CECIL F. POOLE
United States Attorney
Northern District of California

JERROLD M. LADAR
Assistant United States Attorney

KEVIN T. MARONEY
LEE B. ANDERSON
Attorneys
Department of Justice
Washington, D. C. 20530

Attorneys for Appellant

APPENDIX

Statutes

§ 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. * * *

* * * * *

No sentence shall prescribe any other method of computing the term. As amended Sept. 2, 1960, Pub.L 86-691, § 1(a), 74 Stat. 738.

§ 3569. Discharge of indigent prisoner

(a) When a poor convict, sentenced for violation of any law of the United States by any court established by enactment of Congress, to be imprisoned and pay a fine, or fine and costs, or to pay a fine, or fine and costs, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and costs, such convict may make application in writing to the nearest United States commissioner in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter.

If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I do not have any property, real or personal, exceeding $20, except such as is by law exempt from being taken on civil process for debt; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use and benefit. So help

me God." Upon taking such oath such convict shall be discharged; and the commissioner shall file with the institution in which the convict is confined, a certificate setting forth the facts. In case the convict is found by the commissioner to possess property valued at an amount in excess of said exemption, nevertheless, if the Attorney General finds that the retention by such convict of all of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for the nonpayment of such fine, or fine and costs; * * *

§ 4161. Computation generally

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

* * * * *

* * * * *

Eight days for each month, if the sentence is not less than five years and less than ten years.

* * * * *

§ 4162. Industrial good time

A prisoner may, in the discretion of the Attorney General, be allowed a deduction from his sentence of not to exceed three days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed five days for each month of any succeeding year or part thereof.

In the discretion of the Attorney General such allowance may also be made to a prisoner

performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

Such allowance shall be in addition to commutation of time for good conduct, and under the same terms and conditions and without regard to length of sentence.

§ 4163. Discharge

Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper. If such release date falls upon a Saturday, a Sunday, or on a Monday which is a legal holiday at the place of confinement, the prisoner may be released at the discretion of the warden or keeper on the preceding Friday. * * *

§ 4164. Released prisoner as parolee

A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

This section shall not prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

CECIL F. POOLE

CECIL F. POOLE
United States Attorney

CERTIFICATE OF MAILING

This is to certify that three copies of the foregoing Reply Brief of Appellant was this date mailed to the following:

Richard Gladstein, Esq.
1182 Market Street
San Francisco, California

DATED: September 13, 1968.

CECIL F. POOLE

CECIL F. POOLE
United States Attorney